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SUMMARY RECORD OF THE 469th MEETING

Held at Headquarters, New York
on Tuesday, 5 May 1992, at 10 a.m.

Chairman: Mr. ABASCAL ZAMORA (Mexico)

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International payments: draft Model Law on International Credit Transfers (continued)

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The meeting was called to order at 10.05 a.m.

INTERNATIONAL PAYMENTS: DRAFT MODEL LAW ON INTERNATIONAL CREDIT TRANSFERS (continued) (A/46/17; A/CN.9/346, 347 and Add.1 and 367)

1. The CHAIRMAN, in inviting the Commission to resume consideration of article 16 (7) of the draft Model Law, as set out in annex I to document A/46/17, recalled that some fears had been expressed that banks might stipulate derisory interest rates in order to evade their obligation under article 16 to pay interest for failure to execute a payment order. He wished to suggest the deletion of the reference to the contractual freedom of the parties contained in the words "unless otherwise agreed" (A/46/17, para. 89), since the concept of contractual freedom was already covered in article 3. Banks would thus be precluded from stipulating that their liability to clients was less than provided for in article 16 (7).

2. Mr. GREGORY (United Kingdom) said that, while he agreed in principle with the Chairman's suggestion, he had a conceptual difficulty with the idea that the definition of a word might be varied by agreement.

3. Mr. CRAWFORD (Canada) shared the doubt just expressed by the representative of the United Kingdom concerning the varying of a definition. The words "unless otherwise agreed" had a very important function, since without them banks would be governed only by the uncertain provision that interest should be calculated at the rate and on the basis customarily accepted by the local banking community (para. 89). He could not see how such a provision would work in practice. Moreover, the requirement to have recourse to customary practice would impose severe limitations on the contractual freedom of banks. If the Commission were to concern itself with the ability of banks to partially remove the remedy of interest provided for in the draft Model Law by stipulating derisory interest rates, it would be embarking on the topic of consumer protection, a field expressly disavowed in the draft Model Law.

4. The CHAIRMAN said that the alternative to his suggestion to delete the words "unless otherwise agreed" from article 16 bis would be to retain the principles agreed to in article 16 (7), according to which banks would have total freedom to make stipulations in respect of interest in accordance with article 3. Article 16 (7) permitted banks to provide for higher limits on their liability to clients, but prohibited them from discriminating against non-bank originators by requiring that the interest should be defined in accordance with article 2.

5. Mr. CRAWFORD (Canada) said that he had no objections to article 16 (7), since it provided an acceptable minimum level of protection to clients by prohibiting banks from paying derisory interest or no interest at all. The Commission's final text should, at the same time, protect contractual freedom as far as possible. The definition of "interest" contained two equally

(Mr. Crawford, Canada)

important elements: an agreed interest rate and an ascertainable interest rate. The fear had been expressed that banks might attempt to impose derisory interest rates for the purposes of article 16 (7). He would be reluctant to preclude the possibility for the parties to agree on the rate, merely in order to forestall such attempts. The danger of such attempts being made was not sufficiently grave as to warrant the distortion of two sound articles.

6. Mr. GREGORY (United Kingdom) wondered whether, in defining "interest", it was not possible to preserve the element of contractual freedom while adding some formulation such as "subject to article 16 (7)".

7. The CHAIRMAN asked whether the Commission wished to retain article 16 (7) and the definition of interest in their current form.

8. Mr. OLSZOWKA (Poland) supported the suggestion of the representative of the United Kingdom to add the words "subject to article 16 (7)".

9. Mr. CHATURVEDI (India) said that both article 16 (7) and the definition of "interest" should be left unchanged.

10. Mr. LIM (Singapore) said he would welcome clarification from the representative of the United Kingdom as to how the addition of the words "subject to article 16 (7)" would overcome the problem of the definition of interest.

11. Mr. GREGORY (United Kingdom) said that the problem was one which he had raised earlier: that of a definition subject to variation by agreement. The words "unless otherwise agreed", however, served a specific purpose in the case at hand, since they referred to the basis on which interest was to be calculated. The current definition provided for either an ascertained rate or an agreed rate. If banks must be given the capacity to stipulate rates of interest by agreement, then it should be possible to restrict the types of such agreement to ensure that they were not contrary to the principle set forth in article 16 (7).

12. Mr. CRAWFORD (Canada) said that, since users who received derisory interest as compensation should be able to seek remedy under the second part of the definition of interest, he would suggest the addition of another sentence to article 16 (7) along the following lines: "When fixing the rate of interest, the bank may not by agreement bargain for a rate lower than that calculated on the basis customarily accepted."

13. Mr. BURMAN (United States of America) said that, in view of its time constraints, the Commission should be quite clear as to what it wished to accomplish before referring a matter to the Drafting Group.

14. Mr. EL-SHARKAWY (Egypt) said that article 16 (7) should be read in conjunction with article 16 (1). Under paragraph (1), liability was determined by the rate of interest. It might be possible to use the LIBOR rate in effect on the date on which the payment of interest was due.

15. The CHAIRMAN proposed that the Drafting Group should be invited to prepare an appropriate text which would maintain the contractual freedom of parties to fix interest rates, while guarding against abuse of article 16 (7) in the form of derisory interest rates. If he heard no objection, he would take it that the Commission accepted his proposal.

16. It was so decided.

17. The CHAIRMAN referred the Commission to article 16 (8) as set out in annex I to document A/46/17.

18. Mr. EL-SHARKAWY (Egypt) asked why article 16 (8) had precluded recourse to remedies in other laws and doctrines which were favourable to the beneficiary. He suggested that the remedies in the draft Model Law should be exclusive except where the remedies in other legal systems were more favourable to the beneficiary.

19. The CHAIRMAN said that such agreement as existed on paragraph (8) had been reached after strenuous debate. The Bank representing the interests of the banking community had conceded the principle of objective liability to non-bank originators and beneficiaries. In return, it had been agreed that, unless they themselves agreed otherwise, the liability of banks would be limited to the payment of interest, and would not include consequential damages. The implications of removing that protection were enormous in view of the unforeseeable nature of possible damages.

20. Mr. CHATURVEDI (India) said he agreed with the representative of Egypt that certain other remedies, particularly judicial instances, should not be precluded. He would therefore suggest the deletion of the second sentence of paragraph (8).

21. The CHAIRMAN said that paragraph (8) established, firstly, that liability existed even where no contract provided for a bank's liability to the user. Secondly, it provided that the liability set forth in article 16 was the exclusive liability of the bank. Finally, it contained the principle that liability for interest was limited to cases of negligence or wilful failure to execute a payment order. Removal of the second sentence of the paragraph, in his view, would reopen the whole question of liability in the draft Model Law.

22. Mr. GRIFFITH (Observer for Australia) said the principle that a bank should not be liable for the payment of interest except where it had been negligent represented a compromise, even though some representatives had had difficulty with the concept of recklessness. He felt that the text in its current form could be adopted by the Commission.

23. Mr. EL-SHARKAWY (Egypt) said that paragraph (8) should be part of article 16, only if the remedies referred to in that paragraph dealt exclusively with the liability of the receiving bank to pay interest in accordance with paragraph (1) of the article. If that was not the case, paragraph (8) should be a separate article, especially since it referred to "remedies provided in this law". Moreover, it might be preferable to allow the parties to seek remedies provided by national legislation, particularly when such legislation was more favourable to the beneficiary.

24. Mr. HOLEC (Czechoslovakia) fully endorsed the views expressed by the representative of Australia. His delegation could not accept the use of the word "recklessly" in the second sentence of article 16 (8), and he proposed that the Commission should use more customary wording.

25. Mr. BISCHOFF (Observer for Switzerland) supported the proposal made by the representative of Australia. The Model Law would be incomplete without the principle contained in paragraph (8), particularly in the second sentence of the paragraph. However, he considered the wording at the end of the second sentence to be incompatible with the principle of liability for fault. He therefore proposed that the word "recklessly" should be replaced by the words "through gross negligence" or similar wording.

26. Mr. BHALA (United States of America) said that his delegation did not support the views of the representative of Australia. The Commission should avoid taking a hasty decision to conclude its consideration of article 16. His delegation had never accepted the second sentence of paragraph (8), and it did not agree with the representative of Switzerland that the Model Law would be incomplete if that sentence was deleted. The representative of India had very wisely suggested that such remedies should be left to national law. His delegation was inclined to support the proposal by the United Kingdom and Finland to delete paragraph (8) and replace it with an article 16 bis.

27. Mr. EL-SHARKAWY (Egypt) said that he was still uncertain whether or not article 16 dealt with remedies other than the liability of a receiving bank to pay interest to the beneficiary for its failure to execute its sender's payment order in the time required. It was not clear how payment of interest could be the sole remedy, especially since there was no agreement between the parties regarding the rate of interest to be paid.

28. Mr. LIM (Singapore) said that his delegation supported the views expressed by the representative of Australia. Paragraph (8) seemed to be based on formulas used in other liability conventions such as the Convention for the Unification of Certain Rules relating to International Carriage by Air (the "Warsaw Convention") and the United Nations Convention on the Carriage of Goods by Sea (the "Hamburg Rules"). Paragraph (8) provided for certain limits on liability, subject to agreement. Such limits could still be circumvented by an allegation that a bank had improperly executed a payment order or had committed fraud or engaged in reckless behaviour. That provision was similar to the formula contained in the Warsaw Convention.

29. Mr. KOMAROV (Russian Federation) said that different countries applied different criteria for establishing liability for failure to execute contractual or non-contractual obligations. The solution contained in the draft Model Law reflected the general trend towards international unification. It was preferable that the remedies provided in the draft Model Law should be exclusive, and that the question of liability should not be dealt with by national law.

30. The exceptions referred to in the last sentence of article 16 (8) referred to cases in which a bank failed to execute a payment order or had executed it improperly. The question of execution or non-execution should be linked not so much to payment orders as to the bank's obligations under the Model Law, since, in addition to the bank's obligations to execute payment orders, the bank was subject to other obligations stipulated in the Law. If the provision contained in the second sentence of paragraph (8) was interpreted literally, the conclusion could be drawn that all those other obligations were not covered by the provisions of paragraph (8).

31. Mr. DUCHEK (Austria) said that the provisions of paragraph (8) were not similar to the provisions concerning liability in the Warsaw Convention or the Hamburg Rules. In those instruments, liability involved only two parties, while the draft Model Law dealt with a triangular relationship involving the originator, the banking chain and the beneficiary. Under the provisions of paragraph (8), the beneficiary could not address a complaint to the bank that had caused the delay in payment and the additional loss. The risk would therefore be borne by the beneficiary in cases where the originator was unable to pay, or by the originator. It was therefore questionable whether the provisions contained in paragraph (8) were justified in all circumstances.

32. His delegation was in favour of deleting the second sentence of paragraph (8) and leaving the question of liability to national legislation. His delegation supported the proposal made by the United Kingdom and Finland.

33. Mr. SANDOVAL (Chile) said that his delegation was in favour of retaining paragraph (8) as it stood.

34. Mr. ROJANAPHAUR (Thailand) said that his delegation was in favour of retaining the second sentence of paragraph (8) without change.

35. Mr. SCHNEIDER (Germany) said that, if the second sentence of paragraph (8) was deleted, the Commission would have to reopen its debate on all the other issues. It was true, however, that the Commission was discussing a compromise that had never been precisely defined. In a previous draft of the Model Law, it had been explicitly stated that there should be no remedies for consequential damages. That stipulation had been eliminated because other remedies had to be taken into account.

36. The second sentence of paragraph (8) was so important that it should be made a separate article. However, that sentence required some clarification,

(Mr. Schneider, Germany)

and he proposed that the words "which would increase the liability of the bank" should be inserted between the words "doctrines of law" and "shall be available". While it would be possible to increase such liability by contract, there should be no increase in liability without the bank's agreement.

37. Mr. ZHAO Chengbi (China) said that his delegation was in favour of retaining the current wording of paragraph (8).

38. Mr. CRAWFORD (Canada) said that he agreed entirely with the points made by the representative of Germany. The representatives of the United States and Austria had expressed concerns about the possible misinterpretation of the second part of the second sentence of paragraph (8). However, he did not believe that either delegation objected to the idea that the interest remedy should be exclusive. Perhaps the Commission should consider deleting the second part of the second sentence.

39. The CHAIRMAN said that the representatives of Austria and the United States were in favour of deleting not only the second part of the second sentence of paragraph (8), but the second sentence in its entirety. Moreover, the representative of the United States had expressed support for paragraph 16 bis, proposed by the United Kingdom and Finland.

The meeting was suspended at 11.30 a.m and resumed at 11.50 a.m.

40. Mr. CHATURVEDI (India) said he agreed with the Canadian representative that the last part of the second sentence of paragraph (8) posed real problems, as it referred to matters which were difficult to prove. He would therefore prefer either that the second sentence should be deleted entirely, or that it should end with the words "executed a payment order".

41. Mr. OLSZOWKA (Poland) said that his delegation would prefer to leave the text of paragraph (8) as it stood.

42. Mr. EL-SHARKAWY (Egypt) said that a choice must be made between either adopting paragraph (8) as drafted or leaving the entire matter to the remedies available under national law, as those were the only ways to maintain the balance achieved in the paragraph between the various interests involved.

43. Mr. GRIFFITH (Observer for Australia) suggested that the last part of the second sentence of paragraph (8) should be amended to read: "(b) recklessly and with particular knowledge that damage might result."

44. Mr. BURMAN (United States of America) said that, because of the nature of international credit transfers, it was necessary to establish the limitations of liability carefully. The goal was to impose on banks the minimum amount of liability possible; as it stood, however, the second sentence would make possible the imposition of far too much liability.

45. The CHAIRMAN suggested that an effort might be made to find a substitute for the word "recklessly" in the English text, as it appeared to convey the idea of fault or negligence, although the French and Spanish equivalents of the word did not.

46. Mr. BURMAN (United States of America) suggested that the last part of the second sentence should be amended to read: "(a) with the actual intent to cause loss, or (b) with gross recklessness and with actual knowledge that damage is likely to result."

47. Mr. FUJISHITA (Japan) said that if the second sentence were retained, he would oppose any effort to change its wording. A similar distinction had been established in the case of transport agreements; he could therefore see no objection to the wording of the second part of the sentence.

48. Mr. GREGORY (United Kingdom) supported the amendment suggested by the Australian representative. The term "gross recklessness" suggested by the United States representative had no meaning in English law. He noted that paragraph (8) did not provide that remedies should be available, but only that those remedies should be exclusive and that no other remedy should be available except where provided for under national law.

49. The CHAIRMAN stressed that the Commission was working on an international instrument, which made it inappropriate to use concepts specific to a given legal system. The word "recklessly" for example, was not to be interpreted with reference to the concept of "negligence" as used specifically in civil-law systems. Terms used in international instruments tended to be descriptive in nature rather than strict legal concepts. By such means, international uniformity was achieved.

50. The word "recklessly" had first come into use in the context of transport agreements. The word had been much debated, precisely because it was not known how a court would interpret it. Until the term came before the courts, it carried only the Commission's own interpretation. There was no international case-law to guide the Commission's work, and therefore any term it selected should be descriptive and provide guidance to the courts on the Commission's intentions. He recalled the proposal to include a rule of uniform interpretation, typical of the international conventions drafted recently.

51. Mr. LE GUEN (France) favoured keeping article 16 (8) as currently drafted, for all of the reasons already given. Paragraph (8) struck a balance, and if the balance were changed, that might reopen the discussion of the entire draft Model Law.

52. He felt that a compromise solution might be to adopt the wording proposed by the delegation of Australia. If for the common-law countries it was necessary to stress the exceptional nature of the liability stipulated in the second sentence of paragraph (8), he would be in agreement with the wording "with actual knowledge".

53. Mr. EL-SHARKAWY (Egypt) also felt that the second sentence of paragraph (8) should be retained, pointing out that the terms used in (a) and (b) were widely used in several international conventions, and well known in both the common-law and the civil-law systems. In the latter, "intent to cause loss" equated with "fraud", and "recklessly" with "gross negligence".

54. Mr. FELSENFELD (United States of America) withdrew his delegation's earlier suggestion to add the word "gross" before "negligence", but stressed that "actual" when applied to "knowledge" was an important concept under United States law. While it would certainly be possible for the Drafting Group to find a different word conveying the same sense, the problem was in the concept itself of "actual knowledge", as it contrasted with what in United States legal usage would be called "constructive knowledge".

55. He cautioned against drawing analogies with transportation conventions. Transportation and international banking were totally different. International banking transfers involved hundreds of thousands of payment orders, while transportation involved far fewer transactions, much lower speed of transaction and much greater clarity of information. All parties to a transportation transaction were aware of the risks they were taking.

56. He also raised the question of the relationship of article 16 (8) to the provisions of article 13, the so-called "money back guarantee". The latter was a major new obligation undertaken by the banks, and it was his understanding that the quid pro quo for that obligation was the establishment of a severe limit on the liability which might arise for the banks in the ordinary course of payment transfers.

57. Mr. LIM (Singapore) said that the representative of the United Kingdom had already summarized the position with regard to the common-law countries, except for the United States. "Recklessness" was a concept well known in such countries. Although it might be argued that in the context of international instruments courts should not interpret the wording in their own local legal context, in the absence of any new definition, that was precisely what they would do.

58. With regard to the wording proposed by the United States, he had no objection to adding "actual" before "intent". On the other hand, he wondered whether it would be contradictory to add "actual" before "knowledge", since the very concept of "recklessness" meant that a party did not care what the outcome would be.

59. With regard to adding "gross" before "recklessness", he was aware that in the United States the concept of "recklessness" had caused problems in the courts, in that aggrieved parties in litigation had attempted to induce juries to exceed limits on liability by alleging recklessness. Adding the concept of "gross" might help in such cases, but he felt that in common-law jurisdictions it would not make any difference at all.

60. The CHAIRMAN said that according to the Hamburg Rules, the carrier was liable only to the extent that the loss, damage or delay in delivery resulted from an act or omission of the carrier done with the intent to cause such loss, damage or delay, or recklessly and with knowledge that such loss, damage or delay would probably result. He wondered whether such wording might be appropriate for the present Model Law.

61. Mr. SCHNEIDER (Germany) said that he was concerned with the actual meaning of "recklessly". If recklessness was a reduced form of intent, the concept could be deleted. If on the other hand, it was a qualified form of negligence, then that was a matter for concern, but he considered nevertheless that it should be deleted, since it was not desirable to refer to negligence in the text.

62. If the majority wished to retain the concept of "recklessness", then there was a need to discuss what was meant by "knowledge". Knowledge might be obtained in any random way, but he felt that the Model Law should specify that what was meant by "knowledge" was "specific information given by the sender that loss might occur".

63. Mr. GREGORY (United Kingdom) said that his delegation would be able to accept some wording along the lines of the Hamburg Rules, and indeed it might be desirable for the wording in the two instruments to be similar. He felt, however, that such wording did not address the concern of the United States with the issue of constructive knowledge, knowledge imputed to someone who did not, in fact, possess it.

64. Mr. GRIFFITH (Observer for Australia) pointed out that the Hamburg Rules specified either "with intent" or "recklessly", while the draft Model Law specified both concepts. He felt that the points made by the United States on "actual knowledge" were valid, and wondered whether the Drafting Group could adapt the wording of the Hamburg Rules to include the concept of "actual knowledge".

65. The CHAIRMAN suggested that the Commission might take advantage of the experience gathered in drafting the United Nations Convention on International Bills of Exchange and International Promissory Notes. In that Convention, a person was considered to have knowledge of a fact if he had actual knowledge of that fact or could not have been unaware of its existence. The latter portion of the definition was intended to deal with the problem of constructive knowledge, covering, for example, the case of a person who, aware that knowing something might cause him harm, closed his eyes to the knowledge. It might resolve the problem raised by the United States and Germany.

66. He hoped that consideration of that definition of knowledge and of other points would enable the Commission to reach a rapid conclusion and move on to other important issues.

The meeting rose at 1 p.m.